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IN THE

Supreme Court of the United States

October Term, 1949.

No. 50.

JULIA LEARNED STEINER,

Petitioner,

vs.

COUNTY OF LOS ANGELES, *et al.*

On Writ of Certiorari to the District Court of Appeal of the State of California, Second Appellate District.

MOTION FOR INTERVENTION AS PARTIES PETITIONER WITH AFFIDAVITS AND MEMORANDUM IN SUPPORT THEREOF.

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MOTION FOR INTERVENTION AS PARTIES PETITIONER.

Julia Learned Steiner, Margaret Estelle Elder, Violet R. Tapper and Joan Dugdale, move this Court as follows:

That Margaret Estelle Elder, Violet R. Tapper and Joan Dugdale, be permitted to intervene and be joined as petitioners in the above entitled action, for the reasons and on the grounds below set forth.

1. The above-entitled suit is a representative action commenced in the Courts of the State of California by Julia Learned Steiner on her own behalf and on behalf of the 20,000 similarly situated civil service employees of the County of Los Angeles. The writ of certiorari

was obtained herein in an attempt to secure a reversal of the decision of the California Courts upholding the County's requirement that all such employees execute an oath and affidavit pertaining to loyalty. As will more fully appear from the attached affidavits, the movants other than Steiner are, and have at all times been, members of the class represented by her in this action.

2. In opposition to Steiner's petition to this Court for a writ of certiorari, respondents argued *inter alia* that the cause had become moot by reason of petitioner's resignation from County employment. (See Brief of Respondents in Opposition to Petition for Writ of Certiorari, pp. 31-32.)

Since it is true that Steiner has ceased to be a County employee, movants are concerned lest Steiner's personal change of status may result in refusal by this Court to adjudicate the issues herein on the merits. The movants for intervention have, as shown in more detail in their affidavits, relied upon the prosecution of this action as a means of preventing the County's penalizing them for their refusal to comply with the requirement that they execute the Loyalty Oath and affidavit, whose validity is here in issue, and as a means of determining whether or not they have the constitutional right to continue to refuse to execute it. At this stage of the instant proceedings they look to an adjudication by this Court upon the merits as their opportunity to secure a reversal of the decision of the California Courts that the County can constitutionally require them to execute the Oath. Not only do they rely upon such an adjudication to obtain protection at this time from enforcement of the requirement, but, as shown in the accompanying memorandum, they would be foreclosed, in case of a failure to secure a favor-

able decision in the pending litigation, from bringing another action to attempt to vindicate their rights.

3. The movants for intervention have been in no way dilatory in that they have not sought intervention at any prior stage of the proceedings. They have heretofore regarded themselves as adequately and fully represented by Steiner, and the need for their intervention has only arisen because respondents in this Court have urged the dismissal of the action as moot.

4. Accordingly, petitioner Steiner, in fulfilment of the duties she assumed as representative of her class, and the other movants herein, in order to protect themselves and their fellow employees against the danger of dismissal of this cause which was brought in part for their benefit and upon which they have relied for an adjudication of their rights, make this motion for intervention in order to obviate the possibility of a dismissal herein on grounds of mootness by reason of Steiner's change of status. The propriety of such intervention and its effectiveness to prevent such a dismissal are more particularly shown in the attached memorandum.

Movants also pray for such further or different relief as to the Court may seem just and proper.

Respectfully submitted,

A. L. WIRIN,

FRED OKRAND,

NANETTE DEMBITZ,

Attorneys for Movants Steiner, Elder, Tapper and Dugdale.

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AFFIDAVIT IN SUPPORT OF MOTION FOR INTERVENTION AS PARTIES PETITIONER

State of California, County of Los Angeles—ss.

Margaret Estelle Elder being duly sworn, deposes and says:

1. I have been continually since 1942, and now am, a permanent Civil Service employee of the County of Los Angeles. I am now employed in the capacity of Librarian II in the Los Angeles County Public Library.

2. The conditions of my tenure and of my discipline and regulation as an employee of the County of Los Angeles are, and have at all times been, in all respects the same as those which governed Julia Learned Steiner in her status as an employee of said County, at the time of the filing of the complaint in the above entitled action;

3. I was at the time of the filing of the complaint in the above entitled action, and now am, subject to the County's requirement of execution of the Loyalty Oath and affidavit and to the threat of penalty for failure to execute it, as set forth in such complaint;

4. Like petitioner Steiner, I am in jeopardy of penalization by the County.

5. I became acquainted with petitioner Steiner in the course of my employment because we were both employed for several years in the same place and type of work; I agree with said Steiner that it is objectionable and improper for the county to require such an affidavit concerning membership in, or direct or indirect support, or following of named organizations from its employees, and I agree with her with respect to the prosecution of a suit to prevent enforcement of the requirement;

6. I at all times regarded and now do regard the above entitled representative action commenced by Steiner as prosecuted in part on my behalf; I had trust and confidence that such action would be prosecuted in the same manner as if I had personally instituted it; and because of the institution and prosecution of such action by Steiner, I did not personally institute an action to litigate the validity of the County's requirement;

7. I have relied upon the Steiner action as a means of preventing the County from penalizing me for my refusal to comply with its requirement that all employees execute the affidavit, and as a means of vindicating what I believe to be my constitutional rights; I have, because of the foregoing circumstances and my interest in this action since its inception, more assurance of the possibility of a favorable adjudication on the merits as to my constitutional rights in the instant case than in the case of *Parker v. County of*

Los Angeles, No. 49, with which it is here consolidated; and I therefore rely upon the adjudication of this action in this court as my opportunity to secure the reversal of the decision of the Courts of California that the County's requirement is constitutional;

8. There was no prior stage in this action when my intervention seemed to me necessary for the prosecution of the action in the manner I deemed desirable, but I am informed by the attorneys in the action that my intervention at this time may be necessary to prevent its dismissal as moot;

9. I therefore desire to intervene herein to assure an adjudication on the merits in this action as to the issue of the validity of the County's requirement that I execute the affidavit, which is described in the complaint in this action.

Violet R. Tapper has been continuously employed by the County of Los Angeles since 1926. She is now a permanent Civil Service Employee of said county and has been such at all times herein involved. She serves in the capacity of First Assistant, Branches Division, Librarian IV. She is similarly situated with affiant and has advised her that she desires to join in this motion. Said Tapper is presently on vacation and hence unable to sign an affidavit on her own behalf in time for its filing herein.

MARGARET ESTELLE ELDER.

Subscribed and sworn to before me this 20th day of October, 1949.

FRED OKRAND,
Notary Public in and for said County and State.

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AFFIDAVIT IN SUPPORT OF MOTION FOR INTERVENTION AS PARTIES PETITIONER

State of California, County of Los Angeles—ss.

Joan Dugdale being duly sworn, deposes and says:

1. I have been continually employed by the Los Angeles County Public Library since September 1947. I am a permanent Civil Service Employee employed in the capacity of Librarian I.

2. The conditions of my tenure and of my discipline and regulation as an employee of the County of Los Angeles are, and have at all times been, in all respects the same as those which governed Julia Learned Steiner in her status as an employee of said County, at the time of the filing of the complaint in the above entitled action;

3. I was at the time of the filing of the complaint in the above entitled action, and now am, subject to the County's requirement of execution of the Loyalty Oath and affidavit and to the threat of penalty for failure to execute it, as set forth in such complaint;

4. Like petitioner Steiner, I am in jeopardy of penalization by the County.

5. I became acquainted with petitioner Steiner in the course of my employment because we were both employed for several years in the same place and type of work; I agree with said Steiner that it is objectionable and improper for the County to require such an affidavit concerning membership in, or direct or indirect support, or following of named organizations from its employees, and I agree with her with respect to the prosecution of a suit to prevent enforcement of the requirement;

6. I at all times regarded and now do regard the above entitled representative action commenced by Steiner as prosecuted in part on my behalf; I had trust and confidence that such action would be prosecuted in the same manner as if I had personally instituted it; and because of the institution and prosecution of such action by Steiner I did not personally institute an action to litigate the validity of the County's requirement;

7. I have relied upon the Steiner action as a means of preventing the County from penalizing me for my refusal to comply with its requirements that all employees execute the affidavit, and as a means of vindicating what I believe to be my constitutional rights; I have, because of the foregoing circumstances and my interest in this action since its inception, more assurance of the possibility of a favorable adjudication on the merits as to my con-

stitutional rights in the instant case than in the case of *Parker v. County of Los Angeles,* No. 49, with which it is here consolidated; and I therefore rely upon the adjudication of this action in this court as my opportunity to secure the reversal of the decision of the Courts of California that the County's requirement is constitutional;

8. There was no prior stage in this action when my intervention seemed to me necessary for the prosecution of the action in the manner I deemed desirable, but I am informed by the attorneys in the action that my intervention at this time may be necessary to prevent its dismissal as moot;

9. I therefore desire to intervene herein to assure an adjudication on the merits in this action as to the issue of the validity of the County's requirement that I execute the affidavit, which is described in the complaint in this action.

JOAN DUGDALE.

Subscribed and sworn to before me this 20th day of October, 1949.

FRED OKRAND,

Notary Public in and for the County of Los Angeles, State of California.

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MEMORANDUM IN SUPPORT OF MOTION FOR INTERVENTION AS PARTIES PETITIONER.

This action is a representative action, commenced in the Courts of the State of California on behalf of the plaintiff and of the class of persons similarly situated, as specified in the complaint. [See Complaint, Tr. of Rec. pp. 1-2.] Under California law, which would seem to govern as to the incidents of the action, as indeed under Federal law and that generally prevailing in other jurisdictions,[1] there is a judicial duty to protect members of

[1]Compare Rule 23(c) of the Federal Rules of Civil Procedure which prohibits the dismissal or compromise of any class action without Court approval, and provides that in a representative action of the type at bar notice shall be given of the proposed dismissal to all members of the class if the Court so directs. And see *Webster, Eisenlohr, Inc. v. Kalodner*, 145 F. 2d 316 (C. C. A. 3, 1944), cert. den. 325 U. S. 867; *Lucking v. First Natl. Bank Detroit*, 142 F. 2d 528, cert. den. 323 U. S. 740. For similar doctrine see *Hanna v. Lyon*, 179 N. Y. 107, 71 N. E. 778; *Maas v. Sullivan*, 142 Misc. 295, 207 N. Y. Supp. 181, aff'd 213 App. Div. 820, 208 N. Y. Supp. 895.

the class represented in a representative action against dismissal of the cause. As to the California law, see: *Scott v. Donahue*, 93 Cal. App. 256; *Spellacy v. Superior Court*, 23 Cal. App. 2d 142; *Whitten v. Dabney*, 171 Cal. 621; *Russell v. Weyand*, 5 Cal. App. 2d 259; *Loeb v. Berman*, 217 Cal. 716; *Waterman v. Lawrence*, 19 Cal. 210.

For the representative plaintiff in effect merely sets the judicial machinery in motion;[2] the represented persons in a class action have rights similar to those of the nominal plaintiff. See *Young v. Higbee Co.*, 324 U. S. 204, 209. They are "a kind of co-plaintiff's with those named" (*The Mayor etc. v. The Alexandria Canal Co.*, 12 Pet. (U. S.) 91, 100.) This doctrine as to the relation of the plaintiff and the class and the corollary principle of protection for members of the class against dismissal of the suit, are inherent in the nature of the class action, and obviously necessary to prevent its becoming an instrument of inequity; for the theory of the representative action is that the members of the class are in effect joined as plaintiffs, being omitted by name solely because of their numbers.[3] [See allegation of complaint herein, R. 2, that the represented parties herein are too numerous to be brought before the Court.]

To effectuate these principles, intervention of members of the represented class must be permitted in the event that they would suffer prejudice from dismissal of the

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[2]See *Liken v. Shaffer*, 64 Fed. Supp. 432 (D. Io., 1946).

[3]See *Spellacy v. Superior Court*, 23 Cal. App. 2d 142; and see *Grand Rapids Furniture Co. v. Grand Rapids Furniture Co.*, 127 F. 2d 245 (C. C. A. 7th, 1945), pointing out that the Federal rule relating to class actions impliedly recognizes the right of all members of the class to join as plaintiffs if they so desire.

action because of a deficiency on the part of the nominal plaintiff;[4] the intervenors have, under firmly established doctrine, all the rights of the original parties[5] and the action thereafter may be continued in their names if it cannot be continued in the name of the original nominal plaintiff.[6]

Permission to the movants to intervene herein so that the suit may, if necessary, be continued in their names would seem indubitably correct procedure in the instant case. Here respondents have contended that the cause should be dismissed for mootness because the suit involves a requirement imposed on employees and the employee status of Steiner, the nominal plaintiff, has terminated.

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[4]See Hornstein, *Problems of Procedure in Shareholders' Derivative Suits*, 42 Columbia Law Review (1942), 572, 576, pointing out that intervention of other members of the class in representative actions in the Federal courts is particularly frequent for the purpose of preventing an "untimely dismissal" of the action because of a defect with respect to the plaintiff's standing. See also *Cohen v. Young*, 127 F. 2d 721 (C. C. A. 7, 1942); *Malcolm v. Cities Service Co.*, 2 F. R. D. 405 (D. Del., 1942); *American Brake Shoe & Foundry Co. v. Interborough Rapid Transit Co.*, 3 F. R. D. 162 (D. N. Y., 1942); *Golconda Petroleum Corp. v. Petrol Corp.*, 46 Fed. Supp. 23 (D. Cal., 1942).

Intervention would be a matter of right under Rule 24(a) of the Federal Rules if the application to intervene were made for the purpose of preventing dismissal and the applicant would be bound by the judgment in the action; in the absence of the latter factor intervention would be permissive under Rule 24(b).

[5]See *Elder v. Western Mining Co.*, 280 Fed. 569, 578 (C. C. A. 8); *Piccard v. Sperry Corporation*, 36 Fed. Supp. 1006 (D. N. Y., 1941), aff'd 120 F. 2d 328; *Godfrey L. Cabot, Inc. v. Binney & Co.*, 46 Fed. Supp. 346 (D. N. J., 1942); *In re Raabe, Glissman & Co.*, 71 Fed. Supp. 678 (D. N. Y., 1947).

[6]See *Cohen v. Young*, 127 F. 2d 721 (C. C. A. 7th, 1942), and *American Brake Shoe & Foundry Co. v. Interborough Rapid Transit Co.*, 3 F. R. D. 162 (D. N. Y., 1942), where intervenors in class suits were held to have the right to continue suits and to appeal in their own names. And see *Hanna v. Lyon*, 179 N. Y.

Such a dismissal of the case would be highly prejudicial to the employees who were represented by Steiner and who are here moving for intervention, and to the many others similarly situated. As shown in their affidavits, they have jeopardized their livelihood as County employees by refusing to execute the affidavit required by the County and they have relied upon the instant action for protection against penalization for such refusal and for the vindication of their constitutional rights; at this stage of the proceeding they are looking to the adjudication of this case by this Court for a reversal of the unfavorable decision of the California courts. Failure to secure a favorable decision on the merits in the instant litigation would not only mean the loss of their opportunity to protect themselves at this time against penalization for refusal to execute the Oath, but also would in all likelihood mean its permanent loss, for the issue of the constitutionality of the County's loyalty requirement, whether or not determined by this Court, would be *res adjudicata* in the California courts. Thus, there is no

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107, 71 N. E. 778, where it was established that the plaintiff stockholder who had commenced a class action was ineligible to bring it because he had sold his stock prior to its commencement; held by the Court of Appeals of New York that it was error to dismiss the action in view of the intervention of a *bona fide* member of the class. See, also, *Wolke v. Poretsky*, 144 F. 2d 505 (App. D. C. 1944), cert. 323 U. S. 777, where the intervenor was held to have the right to prosecute an appeal in lieu of the plaintiff; *Bragg v. Gerstel*, 148 F. 2d 757 (C. C. A. 5th, 1945), where a petitioning intervenor was substittued as appellant to prevent the dismissal of an appeal where the appeal had been taken in the name of one who no longer had standing to sue. The California rule is in accord. *Scott v. Donahue*, 93 Cal. App. 256; California Code of Civil Procedure, Sec. 385; *Davis v. Rudolph*, 80 Cal. App. 2d 397.

doubt that the movants for intervention satisfy the test of suffering prejudice from the possible dismissal of the action; indeed, using Rule 24(a) of the Federal Rules of Civil Procedure as the standard, their intervention is a matter of right, since they are bound by the judgment in the instant litigation.[7]

While the movant employees would thus be vitally prejudiced by dismissal of the action for want of a suitable party petitioner, the respondents would be in no way affected by the grant of this motion for intervention. The movants are and always have been, as stated in the complaint, in a precisely similar situation to Steiner's with respect to the issue herein, in that their status, tenure and discipline as employees was and is subject to precisely the same regulations as Steiner's; like Steiner they were subject to the requirement of execution of the Loyalty Oath and to threats of penalization for failure to execute it; and like Steiner they refused to execute it. No new fact or issue of any sort will be introduced into the action by their intervention; the intervenors and the original parties would have the "same legal interests (and) are controlled by the same facts" so that "no possible injustice or disadvantage could follow." *Elder v. Western Mining Co.*, 280 Fed. 569, 578 (C. C. A. 8).

The fact that the movants did not participate in the courts below does not mitigate against their motion for

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[7]See *Weeks v. Barcco Oil Co.*, 125 F. 2d 84 (C. C. A. 7th, 1941).

intervention herein. No occasion arose for them to seek to protect their interests by intervention until the case reached this Court; they have therefore been in no way remiss or dilatory in asserting their interest in the action.[8]

The principle that other members of the class must be protected against dismissal of the suit applies whenever their interests are threatened by dismissal whether it be in the court of original jurisdiction or on appeal. See the *Spellacy* and *Scott* cases, cited *supra*. Accordingly, no distinction can be made between courts of original jurisdiction and courts of appeal for the purpose of determining the right of members of the class to intervene for protection against such dismissal. The appellate Federal courts customarily grant to persons who have not appeared in the court of original jurisdiction the right to intervene in the appeal where such permission is necessary to the ends of justice. See *United States v. St. Louis Terminal Co.*, 236 U. S. 194, where this Court granted a motion for intervention by parties who had not appeared below and who would be affected by this Court's disposition of the cause;[9] *Elder v. Western Mining Co.*, 280 Fed. 569 (C. A.

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[8]Compare *Malcolm v. Cities Service Co.*, 2 F. R. D. 405 (D. Del., 1942), holding that the defense of laches could not be invoked against stockholders seeking to intervene in a class action in absence of proof that they had known at a prior time they were not adequately represented therein.

[9]This Court granted a motion for intervention in this Court by persons who had not been allowed to intervene below, stating:

> "The challenge by the United States of the right to hear intervening petitioners is without merit, since even although the petitioners were not parties, they are entitled to be originally heard concerning the settlement of the decree insofar as it might operate prejudicially to their rights." (236 U. S. at p. 199.)

8th, 1922), where persons were granted the right to intervene in the Court of Appeal and "considered as though they had been made parties complainant before final judgment below"; *Wolke v. Poretsky*, 144 F. 2d 505 (App. D. C., 1944), cert. den. 323 U. S. 777, where persons were allowed to intervene after the final decree and held to have the right to appeal in lieu of the plaintiff. And in *Walling v. James V. Reuter*, 321 U. S. 826, this Court suggested the appropriateness of substitution in this Court of a party respondent so that an effective judgment could be rendered.

In sum, therefore, we submit that the effectuation of the principles established in California as well as Federal law with respect to the rights of the members of the represented class in a representative action, require the grant of the motion for intervention as parties petitioner; that the prior procedure of this Court and the lower Federal Courts shows the propriety of such grant; and that there is no consideration of law or policy mitigating against the grant of the motion.

Respectfully submitted,

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